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# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-407

ERNEST INFELICE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 74-5397

MARIO GARELLI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A)[1] is not reported.[2]

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[1]"Pet. App." will refer to the appendices to the petition in No. 74-407.

[2]The judgement of affirmance is reported at 500 F. 2d 1406.

## JURISDICTION

The judgment of the court of appeals was entered on August 8, 1974, and a timely petition for rehearing was denied on September 11, 1974 (Pet. App. B). The petition for a writ of certiorari was filed on October 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether heroin was a "controlled substance" at the time charged in the indictment.

2. Whether the trial court properly evaluated certain recordings of petitioners' conversations.

3. Whether the trial court's denial of a motion for polygraph tests was an abuse of discretion.

4. Whether conversations recorded in violation of state law are admissible in a federal trial.

5. Whether a government witness' lapses of memory on cross-examination impermissibly frustrated the right of confrontation.

6. Whether a government agent may testify as to a voice identification made during the course of arrest.

## STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on four counts of distributing heroin and of conspiring to possess and distribute heroin, in violation of 21 U.S.C. 841(a)(1)

and 846.[3] They were sentenced to concurrent terms of ten years' imprisonment on each count, to be followed by consecutive special parole periods on the substantive counts. The court of appeals affirmed (Pet. App. A).

The government's case was based principally upon the testimony of an informant, Robert Burks, who had negotiated for several months to buy $18,000 in heroin from petitioners and their co-defendants. On certain occasions Burks had been equipped with a "Kel-set" recording device, which was used to record some of his conversations with petitioners.

Negotiations between petitioners and Burks began in October 1971. At first they dealt through an intermediary, Ernest Brown, but Burks and Garelli later agreed to deal directly (Tr. 70). At a meeting in late October, Burks showed Garelli $5,000 and told him he could get $5,000 more (Tr. 757). Garelli agreed that Brown had mishandled the negotiations; he asked how much heroin Burks' people wanted and how much he thought he could distribute (Tr. 74). Burks said he had been dealing for a pound and an eighth; Garelli responded that he was waiting for his "connect" and assured Burks that "the stuff is going to be real good" (Tr. 75). Burks and Garelli then approached Infelice, who had been nearby. Burks showed Infelice the $5,000; Infelice cautioned him to be careful with

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[3]Four other defendants were indicted with petitioners. Two, Ernest Brown and James McGarry, were charged only with conspiracy. Brown's case was severed from that of the other defendants prior to trial. McGarry was acquitted at the close of the government's case. The remaining two, Chester Garelli and Frank Sarris, were charged on all counts and entered pleas of guilty during the trial.

his money because there were a lot of "stool pigeons" around and instructed him not to give up his money until he had "the dope in the palm of [his] hand" (Tr. 76-77, 760, 1357).

During the week of November 7, both Garelli and Infelice told Burks that his package would arrive soon, and Garelli advised him to hold onto his money (Tr. 80). At the same meeting, Garelli introduced Burks to his brother, Chester Garelli, and told Burks not to forget Chester's face (Tr. 81).

On January 5, 1972, Infelice told Burks that Garelli had gone to New York to "cop" some heroin, and that he, Infelice, had just returned from a similar mission in Florida (Tr. 106). On January 12, Garelli told Burks that he had gone to New York but had been unable to buy any heroin; he assured Burks that he would be first on the list whenever some became available (Tr. 106-109). On January 28, Burks again approached Infelice and Garelli. Garelli asked Burks if he still had $10,000 and directed him to meet Chester at a designated rendezvous (Tr. 111). Chester there gave Burks a tinfoil package that turned out to contain ground glass. On February 2 Burks complained about this transaction to Infelice, who said he couldn't understand it because he knew Garelli wouldn't distribute "bad stuff" (Tr. 119-120).

Subsequent negotiations, however, resulted in two sales to Burks of a total of about 550 grams of heroin-laden powder for $18,000. When Burks complained to Infelice about the quality of the heroin, Infelice told him, "You know we wouldn't do you like that, we wouldn't give you no bad stuff" (Tr. 160, 1103).

## ARGUMENT

1. Petitioners both contend (Infelice Pet. 24-31; Garelli Pet. 14-20) that the alleged failure of the Attorney General and the Director of the Bureau of Narcotics and Dangerous Drugs to republish and update the schedules of controlled substances as directed by 21 U.S.C. 812(a) warrants reversal of their convictions. Section 812(a), which lists heroin as a controlled substance, provides in part:

> * * * The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter [October 27, 1970] and shall be updated and republished on an annual basis thereafter.

The plain language of the statute requires semiannual republication during a two-year period beginning October 27, 1971. The first republication was therefore not required until April 27, 1972. See *United States* v. *Nocar*, 497 F.2d 719 (C.A. 7), certiorari denied, No. 74-131, November 25, 1974. Accordingly, from October 1971 through April 27, 1972—the period during which petitioners' offenses occurred—heroin plainly was a controlled substance under the statute.[4]

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[4]Infelice argues in the alternative that at least his conviction on count four of the indictment, charging a substantive offense on April 27, 1972, violates the prohibition against *ex post facto* laws. But the schedule of controlled substances would not have lapsed until the end of that day, even assuming republication was otherwise untimely. The court below properly held that all petitioners' "violations of the law occurred before or on the day set by statute for updating and republishing the schedules, and a valid prohibition was in force" (Pet. App. A, p. 12).

2. Petitioner Infelice contends (Pet. 8-17) that certain taped conversations impeached Burks and that the trial court, by "virtually disregarding" the tapes, struck relevant evidence from the record and convicted petitioner on insufficient evidence. These contentions were thoroughly discussed and properly rejected by the court of appeals, on whose opinion we rely (Pet. App. A, pp. 6-7, 10):

> We do not read the court's comments as a reflection upon the admissibility of the taped conversations, but only upon the probative weight he chose to give them. It is clear from the trial judge's comments that he did not cavalierly disregard the evidence as defendants suggest. The court specifically mentioned inconsistencies between the tapes and Burks' testimony and discussed those parts of Burks' testimony which constituted added material from what appeared on the tape. The court plainly indicated that the tapes were offered as independent evidence of the conversations monitored, that at least in certain instances they contradicted the Government's case, and that, especially in light of the absence of explanation, the absence of words on the tapes constituted evidence they were not spoken. However, because of the poor quality of the tapes, with long periods of unexplained hissing and silences, and the failure of the Government to obtain Burks' identification of the speakers, the court found the tapes of "scant value." The trial judge viewed the case as depending upon the credibility of Burks, and the court chose to believe Burks in spite of the tapes. In context, it is clear that the judge "virtually disregarded" the tapes as evidence against defendants and considered them only for their impeachment value.

* * * * *

* * * It was the function of the trial judge to determine the probative effect of the silences on the tapes in relation to the credibility of the testimony of Burks. Questions of credibility have no bearing on the insufficiency of the evidence as a whole and are not for the reviewing court's decision. *United States* v. *Karigiannis,* 430 F.2d 148, 151 (7th Cir. 1970), *cert. denied,* 400 U.S. 904.

3. Petitioner Infelice's contention (Pet. 18-24) that the trial court abused its discretion by denying his motion for polygraph examinations of himself and Burks was likewise correctly rejected by the court of appeals. Trial courts properly exercise broad discretion in acting upon such requests, especially where, as here, the court is also sitting as trier of fact and has the opportunity of observing and examining the witnesses directly and weighing their credibility at first hand. See, *e.g., United States* v. *DeBetham,* 470 F. 2d 1367 (C.A. 9), certiorari denied, 412 U.S. 907; *United States* v. *Penick,* 496 F. 2d 1105 (C.A. 7), certiorari denied, No. 73-6846, October 21, 1974; *United States* v. *Frogge,* 476 F. 2d 969 (C.A. 5), certiorari denied, 414 U.S. 849.

4. Petitioner Garelli contends (Pet. 6-9) that conversations allegedly recorded in violation of state law were inadmissible at his federal trial.[5] But as the court of appeals properly observed (Pet. App. A, pp. 12-13):

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[5]Illinois law forbids a person from using "an eavesdropping device to hear or record all or any part of any conversation unless he does so with the consent of any one party to such conversation and at the request of a State's Attorney * * *." Ill. Rev. Stat., Ch. 38, Section 14-2(a). We do not believe that this statute was intended to apply to the otherwise lawful use of recording devices by federal agents.

> The question of admissibility does not turn upon whether evidence was obtained in violation of state law. Federal law governing the admissibility of evidence in federal criminal trials permits the introduction of such tape recordings.

See *United States* v. *Escobedo*, 430 F. 2d 603 (C.A. 7), certiorari denied, 402 U.S. 951; *United States* v. Teller, 412 F. 2d 374 (C.A. 7), certiorari denied, 402 U.S. 949; *United States* v. *McGuire*, 381 F. 2d 306 (C.A. 2), certiorari denied, 389 U.S. 1053.

5. Petitioner Garelli's contention (Pet. 9-11) that Burks' lapse of memory on cross-examination deprived him of the right of confrontation is without merit.[6] As the court of appeals noted (Pet. App. A, p. 7):

> The determination of whether a defendant's sixth amendment right to confrontation has been violated depends upon whether defendant has been deprived of the right to test the truth of the direct testimony. * * * Burks' lapse of memory here is not comparable to a refusal to answer questions as in *United States* v. *Cardillo*, 316 F. 2d 606 (2nd Cir. 1963). Nor is it equivalent to a denial of the right to examine a witness as in *Smith* v. *Illinois*, 390 U.S. 129 (1968). * * * Garelli was not deprived of the right to test the knowledgeability and credibility of Burks * * * .

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[6]Burks' memory was not as faulty as petitioner suggests. First, the cross-examination focused on dates during and after November 1971, when Burks had little or no contact with Garelli, rather than upon the important meetings in October 1971. Second, petitioner characterizes certain of Burks' responses in a misleading manner. For example, he states that Burks could not recall his own address or his recent place of employment (Pet. 10). In fact, Burks was asked where he lived in October 1971 and the early part of 1972. He responded that he had lived in the 2200 block of West Division Street but was unable to recall the precise address number (Tr. 198-200). Similarly, he was asked where he had worked prior to July 1971. While he was unable to recall the name of the company, he stated that he worked for a Mr. Ernest at a clothing store located on South Wabash Avenue (Tr. 214-217).

6. Petitioner Garelli's final contention (Pet. 11-14) is that a voice identification made by a federal agent during the course of arrest is not admissible where the arrest occurs after the indictment and outside the presence of counsel. This argument is insubstantial.

Agent James had overheard and recorded a conversation between Burks and an unidentified person on October 26, 1971. He did not observe the conversants. He arrested Garelli, after indictment, in November 1972. Based on what Garelli said to him at the time of arrest, James identified Garelli's voice as that belonging to the other party to the October 26, 197 , conversation with Burks.

An accused has the right to counsel at every "critical stage" of the proceedings against him. *United States* v. *Wade,* 388 U.S. 218; *Gilbert* v. *California,* 388 U.S. 263; *Stovall* v. *Denno,* 388 U.S. 293. An identification is critical "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade, supra,* 388 U.S. at 224. Counsel is needed then, as he would be needed at trial, to counteract suggestive influences or manipulation by the prosecutor and, thus, to reduce the possibility of an irreparably mistaken identification. An identification is not critical, however, where "the subsequent trial would cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant." *United States* v. *Ash,* 413 U.S. 300, 315. Thus, where the defense has an adequate opportunity of re-constructing the identification procedure before the trier of fact and impeaching the identification through cross-examination, absence of counsel at the original identification is not prejudicial.

The defense had such an opportunity here. Petitioner's counsel cross-examined James to reconstruct the arrest scene (Tr. 729-732, 734-735, 738-739), and the voice identified was recorded and preserved on tape, available for comparison. Petitioner therefore had ample opportunity to challenge the credibility of the agent's identification through courtroom demonstration or expert voice analysis.

At bottom, petitioner's contention is that he has a Sixth Amendment privilege against post-indictment arrest in the absence of counsel. Any such privilege would of course intolerably interfere with effective law enforcement. The arrest was lawful, petitioner was properly informed of his rights, and any pertinent observations made by the arresting officers were admissible without regard to the presence or absence of petitioner's counsel.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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